**IN THE HIGH COURT OF BOMBAY AT GOA**

**COMPANY PETITION NO. 1-N OF 2002**

Mr. N. N. Valechha,
Sole Proprietor of
M/s. Cooling Tower
Maintenance Co.,
having office at
B-7, Balakrishna Society,
Opp.Seven Bungalows
Bus Depot, Andheri(W),
Mumbai-400 053. ... Petitioner

versus

M/s. I. G. Petrochemicals
Ltd., Panaji. ... Respondent

Mr. V. A. Lawande, Advocate for the Petitioner.

Mr. Sudin Usgaonkar with Ms. R. Kamath, Advocates for the Respondent.

**CORAM : N. A. BRITTO, J.**

**DATE :15TH SEPTEMBER, 2006.**

**O R D E R**

This is an application for the winding up of the respondent-Company under Section 433(e) of the Companies Act, 1956(Act, for short) on the ground that the respondent has

been unable to pay its debt to the petitioner in the sum of Rs.1,72,406/- and under Section 433(f) of the Act on the ground that the respondent has become commercially insolvent.

2. The respondent is a Company having its factory at Taloja in Raigad District of Maharashtra and its registered Office at Panaji-Goa. The petitioner carries on business of Maintenance Engineers and Repairers of Cooling Towers. The respondent was desirous of carrying out certain modifications to their existing Paharpor Cooling Tower and therefore invited quotations and after negotiations the petitioner was asked to carry out the said modifications pursuant to letter of indent dated 23-1-1999. The petitioner was paid an advance of Rs.25,480/-. As per the petitioner, the petitioner submitted three bills for the supplies made and work done of the repairs of the said cooling towers. The bills are as follows:

| **Date** | **Bill No.** | **Amount** |
|---|---|---|
| **12.04.1999** | **99/010** | **8,829.00** |
| **10.05.1999** | **99/005** | **3,28,907.00** |
| **10.05.1999** | **99/015** | **80,034.00** |
| | **Total** | **4,17,770.00** |

3. As per the petitioner the respondent made a payment of Rs.2,37,820/- to the petitioner on various dates after deducting a sum of Rs.520/- towards TDS and deposited a sum of Rs.7,544/- towards TDS on 2-6-1999 and furnished a TDS Certificate in Form No.16A dated 4-6-1999. As per the petitioner as against the total amount of the bills of Rs.4,17,770/-, the petitioner has received a sum of Rs.2,37,820/- including the advance payment of Rs.26,000/- and the balance due by the respondent is Rs.1,79,950/- which after deduction of TDS of Rs.7,544/- works out to Rs.1,72,406/-. The case of the petitioner is that the petitioner called upon the respondent and its Officers a number of times for the payment of the said sum of Rs.1,72,406/- and thereafter by letter dated 26-7-1999 called upon the respondent to release the said payment of Rs.1,72,406/- due to the petitioner but the respondent by its letter dated 28-7-1999 falsely claimed that only an amount of Rs.13,502/- was payable to the petitioner while it was admitted, acknowledged and accepted fact by the respondent's officials that a sum of Rs.1,72,406/- was due and payable by the respondent. The petitioner claims that by his letter dated 30-7-1999 the petitioner clarified about the said sum which was

due and payable to the petitioner but by another letter dated 11-8-1999 the respondent falsely claimed that only an amount of Rs.46,171/- was due and payable to the petitioner and thereafter the petitioner by notice dated 31-1-2000 called upon the respondent to pay the said sum of Rs.1,72,406/- together with interest at the rate of 24% per annum within 21 days from the receipt thereof but inspite of the said notice the respondent neglected and failed to pay the amount due to the petitioner with interest, as called for by the petitioner.

4. Three points arise for my consideration.

5. The first. The objection taken on behalf of the respondent is with reference to Section 434(1)(a) of the Act. There is no dispute that the registered Office of the respondent is at Panaji, Goa while their factory is at Raigad in Maharashtra. The letter of indent dated 23-1-1999 issued to the petitioner discloses that the registered Office of the respondent is at Panaji, Goa. The petitioner has also filed the present petition showing the respondent's registered Office address at Panaji-Goa. The petitioner served the notice dated 31-1-2000 as

a notice under Section 434(1)(a) of the Act at the respondent's factory address at Taloja, District Raigad of Maharashtra and the respondent sent a reply to it dated 7-2-2000 notwithstanding that the said notice was addressed by the petitioner at the respondent's factory address.

6. Section 434(1)(a), inter alia, provides that a Company shall be deemed to be unable to pay its debts if the creditor serves on the Company, by causing it to be delivered at his registered Office by registered post or otherwise a demand under his hand requiring the Company to pay the sum so due and the Company for a period of three weeks thereafter neglects to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor.

7. The contention of Mr. Sudin Usgaonkar, the learned Counsel on behalf of the respondent is that the provision of Section 434(1)(a) is mandatory and admits of no exception. On the other hand, the contention of Mr. V. A. Lawande, the learned Counsel on behalf of the petitioner is that the respondent having replied to the said notice, the respondent is deemed

to have waived the provision of Section 434(1)(a) of the Act. The learned Counsel on behalf of both the parties have placed reliance on several authorities.

8. Mr. Lawande has placed reliance on the case of **Dhian Singh Sobha Singh and another** v. **Union of India**(AIR 1958 SC 274) wherein the Hon'ble Supreme Court observed, with reference to notice under Section 80 C.P.C. that the terms of the notice should not be scrutinized in a pedantic manner or in a manner completely divorced from common sense and referring to Pollock C. B. in **Jones** v. **Nicholls** as well as a decision of this Court in **Chandu Lal Vadilal** v. **Government of Bombay** (AIR 1943 Bom 138) held that one must construe Section 80 with some regard to common sense and to the object with which it appears to have been passed. Mr. Lawande has also placed reliance on the case of **Dhirendra Nath Gorai** v. **Sudhir Chandra Ghosh and others**(AIR 1964 SC 1300) wherein the Hon'ble Supreme Court considered the proposition whether an act done in breach of the mandatory provision is per force a nullity. That was with reference to Section 35 of Bengal Money-Lenders Act, 1940 and concluded that an objection that the sale

proclamation did not conform to Section 35 of the said Act cannot avail a judgment-debtor in an application under O.21 R.90, if he was present at the drawing up of the sale proclamation and did not raise any such objection at the time, nor can it avail a judgment-debtor who, after receiving notice did not attend at the drawing up of the sale proclamation at all. The Supreme Court, inter alia, referred to Maxwell On the Interpretation of Statutes at page 375, 11th Edition and as regards waiver of a right and noted that:

> "Another maxim which sanctions the non-observance of a statutory provision is that cuilibet licet renuntiare juri pro se introducto. Everyone has a right to waive and to agree to waive the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity, which may be dispensed with without infringing any public right or public policy".

9. It is not at all necessary for me to enter into this controversy sought to be raised on behalf of the petitioner because it appears that there is preponderance of judicial opinion in support of the view that the provisions of Section 434

(1)(a) are mandatory and admit of no exception and they cannot be waived. A Division **B**ench of this Court in **N. L. Mehta Cinema Enterprises (P.) Ltd.** v. **P. P. Mehta**(1991(70) Company Cases 31) referring to Section 434 of the Act has held that the Section requires that such notice of demand must be sent to the registered Office of the Company and the clear wording of the Section precludes an argument that service at any administrative Office of the Company would be sufficient to raise a presumption or fiction under Section 434 of the Act. The learned Division Bench also noted that the fiction of Section 434 was not available to the petitioner since it did not address the notice of demand to the registered Office of the Company. The submission of Mr. Lawande has been squarely dealt with by the Delhi High Court in the case of **State Black Sea Shipping Co. and anothe**r v. **Viraj Overseas Pvt. Ltd.**(2005(125)Company Cases 831) wherein it was held that the fact that a reply was sent by the respondent-Company to the statutory notice of the petitioners and the fact that no objection was taken in the said reply could not be taken into account because the statutory fiction had to be strictly construed and if a statutory requirement based on a statutory fiction is to be construed strictly, the petition had to

be dismissed as not maintainable. The Delhi High Court considered various judgments, mentioned therein including that of **Bukhtiarpur Bihar Light Railway Co. Ltd.** v. **Union of India** ((1954(24) C.C. 507) and that of this Court in the case of **N. L. Mehta Cinema Enterprises(P.) Ltd.** v. **P. P. Mehta**(supra). In the case of **B. Viswanathan** v. **Seshasayee Paper and Boards Ltd.** ((1992) 73 C. C. 136) it was held that unless the statutory notice served on a Company under Section 434 of the Companies Act is in conformity with the mandatory requirements of Section 434(1)(a) of the Act, the presumption under the Section as to the Company's inability to pay its debts cannot be raised. That was a case where the notice was not served on the Company at its registered Office but on its Managing Director and therefore it was held that the notice did not confirm to the mandatory requirement of Section 434(1)(a) of the Act. In the case of **Vysya Bank Ltd.** v. **Randhir Steel and Alloys(P.) Ltd.**(1993(76) Company Cases 244) this Court held that "the inability or deemed inability of the Company to pay its debts arises by compliance with the requirements laid down in Section 434 and that is the basis of this Company Petition, and therefore, there is no question of waiver". The view held in

I**ndian Oil Corporation Ltd.** v. **NEPC India Ltd.**(2003(114) Company Cases 207) that a notice served on the administrative office of the Company is a valid notice is of no assistance to the case of the petitioner in the facts and circumstances of this case where the notice was served on the factory address of the petitioner. In any event, it must be held that the said view is contrary to the views expressed by the Division Bench of this Court as well as other decisions referred to hereinabove and therefore need not be followed.

10. The second. There is again preponderance of judicial opinion in support of the proposition that apart from the legal fiction it is open to a petitioner to make and prove an alternative claim that the Company is unable to pay its debts. The petitioner pleaded that the petitioner had called upon the respondent and its Officers a number of times for the payment of the said sum of Rs.1,72,406/- and the petitioner was informed by one Mr. G. V. Reddy and Mr. J. K. Saboo of the respondent-Company that the bills were passed for payment in full and were sent to the accounts department and the petitioner was asked to contact Mr. K. C. Vyas of the accounts department for the cheque

and when the said K. C. Vyas was contacted, the petitioner was informed that the funds were not available at that time and the petitioner could expect the cheque in 7 to 8 days and therefore the petitioner called upon the respondent-Company by letter dated 26-7-1999, to put the said facts on record, to release the payment of Rs.1,72,406/- due and payable to the petitioner. On the other hand, as per the respondent, inspite of various correspondence addressed to the petitioner as regards negligent workmanship of the petitioner and the respondent having expressed surprise that the repairing done by the petitioner had failed within a period of 45 days and inspite of the petitioner having been informed to visit the plant on 27-5-1999 to carry out performance of the repaired cooling tower cell and the petitioner having been informed that the deflectors had developed leakages which were required to be attended to by the petitioner, etc. the respondent was totally shocked and taken aback when they received a letter from the petitioner dated 26-7-1999 whereby the petitioner erroneously and falsely contended that an amount of Rs.1,72,406/- was due and payable by the respondent to the petitioner and therefore the petitioner by their reply dated 28-7-1999 informed the petitioner that the

balance amount due to the petitioner was only Rs.13,502/- and not Rs.1,72,406/- as claimed by the petitioner and after the petitioner addressed letter dated 30-7-1999 with claims that certain amounts were due and payable towards certain accounts such as treated timber, long target nozzles, extra material used and FRT Louvers, the respondent by letter dated 11-8-1999 clarified that save and except an amount of Rs.28,062/- towards challan dated 5-2-1999 and Rs.9,280/- towards challan dated 5-3-1999 and an amount of Rs.8,829/- in respect of FRT Louvers totaling to Rs.46,171/- nothing was due and payable by the respondent to the petitioner as sought to be mischievously contended by the petitioner. In other words, the respondent admitted its liability, if at all, in the sum of Rs.46,171/- which amount, the respondent by virtue of Order of this Court dated 11-8-2006, has deposited in this Court on 24-8-2006.

11. There is no dispute that initially the petitioner was paid an advance of Rs.26,000/- on which TDS of Rs.520/- was deducted by the petitioner. Subsequently, the petitioner was paid a sum of Rs.1,32,340/-, Rs.30,000/- and Rs.50,000/-, as stated in Exh. "E" to the petition. Although, the petitioner claims

that respondent's liability in the sum of Rs.1,72,406/- was an admitted and acknowledged fact by the respondent's Company, the petitioner has not been able to produce any prima facie evidence to support the said plea and on the contrary it appears that what was due and payable to the petitioner was contested by the respondent even much before the petitioner sent the said notice dated 31-1-2000 to the respondent. As can be seen from the letter of the respondent dated 28-7-1999-Exh."F" to the petition, the respondent disputed its liability to pay the first and second bills namely of Rs.8,829/- and Rs.80,034/- stating that the said bills were towards extra material supplied which did not have their approval and therefore the said amount was not payable to the petitioner. As regards the second bill of Rs.3,28,907/-, the respondent passed the same for Rs.2,59,386/-, deducting an amount of Rs.70,939/-(Rs.69,521?) stating that the said amount was on account of replacement of timber and long nozzles was not payable to the petitioner but, subsequently by letter dated 31-8-1999(Exh."H" to the petition) the respondent agreed to pay Rs.8,829/- due on the first bill dated 12-4-1999 which was later clarified, by the petitioner, as being payable to the Contractor M/s. Melfrank. The respondent

also accepted its liability for payment of Rs.28,062/- towards treated timber and Rs.9,280/- towards long target nozzles and accepted the liability to pay the said sum of Rs.46,171/-, thus admitting its liability to pay a sum of Rs.46,171/- only. In other words, except for accepting the liability of Rs.46,171/-, the respondent did not accept the liability to pay any further amount, as claimed by the petitioner and the correspondence exchanged between the petitioner and the respondent shows that any liability over and above Rs.46,171/- has been disputed by the respondent. Nevertheless, the entire case of the petitioner as regards the demand of liability by the respondent is based on the Certificate of TDS in Form No.16A(Exh."D" dated 4-6-1999) on which TDS of Rs.7,544/- has been shown as paid against an amount of Rs.3,77,220/-. There is no dispute that the said Certificate also shows that a sum of Rs.520/- was paid as TDS on the advance payment made to the petitioner of Rs.26,000/-. To repeat, the Certificate shows that a tax in the sum of Rs.7,544/- has been deducted as against an amount of Rs.3,77,220/-. No doubt the respondent has not explained as to how and in what circumstances the said figure of Rs.3,77,220/- came to be arrived at on which Rs.7,544/- was deducted as tax at source.

The total amount payable, as per the petitioner, was Rs.4,17,770/-. This figure is not shown on the said Certificate. As per the petitioner, the petitioner has received Rs.2,37,820/- and Rs.1,79,950/- is payable(less Rs.7544/-). Either of the said two figures are also not shown on the said Certificate. The figure shown therein of Rs.3,77,220/- has also not been paid to the petitioner. In other words the figure mentioned therein cannot be at all correlated to the sum claimed by the petitioner. In my view, the said Certificate, as the very Certificate shows, can prima facie be proof only of the tax deducted at source and not of the amount due to the petitioner more so when what is the amount mentioned therein has not been shown by the petitioner as due to him. The said Certificate, therefore, in my view, cannot be taken as prima facie evidence of the debt or liability of the petitioner in the sum of Rs.3,77,220/- when the very case of the petitioner is that what is due and payable to the petitioner is the sum of Rs.1,72,406/-. As already stated, there is a serious dispute as regards what is due and payable to the petitioner which dispute cannot be gone into in summary proceedings of this nature. What was the scope of letter of indent dated 23-1-1999, how much timber was used, how many

nozzles and long nozzles were used; whether the use was authorized are all complicated questions which can be decided only after evidence is led before the bills claimed by the petitioner can be settled. This cannot be done in this proceedings which are of summary nature. Petitioner's claim will require a detailed investigation to be made and the appropriate forum to do the same is the civil court. The dispute raised by the respondent is a bona fide dispute and the appropriate remedy for the petitioner is by way of a civil suit to recover the amount due to the petitioner by the respondent. In this context, reference could be made to the case of **Smt. Vijayalakshmi** v. **Hari Hara Ginning and Pressing Pvt.Ltd.** (2001(Vol.103) Company Cases 195) wherein it is stated that it is well settled that the procedure under Section 433 of the Companies Act is summary. Bona fide dispute implies the existence of substantial ground for the dispute raised. Such a dispute has been made out by the respondent. At this stage reference to some decided cases will be in order. "It is well settled that a winding up petition is not a legitimate means of seeking to enforce payment of a debt which is bona fide disputed by the company. A petition presented ostensibly for a winding up order but really to

exercise pressure will be dismissed, and under circumstances may be stigmatised as a scandalous abuse of the process of the court".(**Amalgamated Commercial Traders(P.) Ltd.** v. **A. C. K. Krishnaswami**(1965) 35 Company Cases 456). "The jurisdiction of the court under section 433 of the Companies Act, 1956, is not that of a court which is essentially meant for settling money disputes between parties, but is to subserve the object of winding up of companies which have not paid their debts or which are unable to pay their debts. Therefore, the first pre-requisite must be to establish prima facie a debt against the respondent. But when a claim or debt is disputed, the proper forum for that is a civil court. Where, therefore, admittedly, there was a genuine dispute as to the liability of the respondent-company to pay the difference between what has been admitted and what has been claimed, it would not be proper to decide the case in the summary proceedings under section 433"(**Kamadenu Enterprises** v. **Vivek Textile Mills P.Ltd.**(1984) 55 Company Cases 68). The petitioner therefore will have got to be relegated to civil suit as regards the disputed amount.

12. The third. On behalf of the respondent, it is stated

that the respondent-Company is a going concern employing around 350 employees and has in fact earned a profit of Rs.50,00,000/- for the financial year ending 31-3-2006. It is also stated that the respondent-Company is one of the market leaders in the field of Phthalic and Anhydride and is in a position to meet its liabilities as and when they arise in the course of business. The respondent has denied that the respondent-Company is commercially insolvent. It is submitted on behalf of the petitioner that the respondent has not supported the said averments in the reply dated 17-7-2006 with any documents. Whether the respondent is commercially insolvent, the onus to prove the same was upon the petitioner. The petitioner has not filed any document in support of the same. No doubt the respondent at one stage approached the Board of Industrial and Financial Reconstruction(BIFR) but as can be seen from the very order of BIFR dated 2-6-2005, the said BIFR has accepted the respondent's contention that they have been able to wipe out its entire accumulated losses as on 31-3-2006 and the net worth of the Company has turned positive. The respondent-Company therefore was deregistered before the BIFR. If the BIFR has accepted the positive financial position of the respondent-

Company there is no reason why this Court should not accept the same. The Court is bound to take into consideration the financial position of the Company not when the application was filed but at the time of making the order for winding up. The petitioner therefore is not entitled for a winding up order under Section 433(e) of the Act, as well.

13. The bills raised by the petitioner were not accepted by the respondent at any time. The dispute raised by the respondent appears to be bona fide and it also involves disputed questions of fact which can be gone into in a full-fledge inquiry before the Civil Court and not by way of a summary inquiry in a winding up petition. The petition therefore is hereby dismissed. The petitioner is at liberty to withdraw the sum of Rs.46,171/- which has been deposited by the respondent, along with accrued interest. Costs by the petitioner quantified at Rs.2,500/- to be paid to the respondent.

**N. A. BRITTO, J.**

**RD**